

Office of Chief Counsel
Internal Revenue Service

memorandum

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KNSommers 7293

date: MAY 12 1999

to: Sandra McMullen, Revenue Agent
CE 1104 San Diego

from: Karen Sommers, Attorney
San Diego Associate District Counsel Office

subject: [REDACTED]

DISCLOSURE LIMITATIONS

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to the attorney-client and deliberative process privileges and, if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to persons beyond those specifically indicated in this statement or to taxpayers or their representatives.

This advice is not binding on the Internal Revenue Service and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

ISSUES

1. Whether a refund claim of \$[REDACTED] should have been aggregated with a related refund claim in excess of \$1 million, for purposes of preparing a report notifying the Joint Committee on Taxation pursuant to I.R.C. Section 6405(a) prior to making the refund.

2. Whether the aforesaid refund of \$[REDACTED] should be characterized as erroneous because the Service did not treat it as part of a Joint Committee case prior to making the refund.

FACTS

██████████'s ██████████ 1120 return reported a net operating loss of over \$██████████. ██████████ claims that this NOL is a specified liability loss pursuant to I.R.C. § 172(f) and that ██████████ is entitled to the 10-year carryback provided under Treas. Reg. § 1.172-13. To this end, ██████████ filed amended returns, Forms 1120X, carrying back the ██████████ loss to the years ██████████, ██████████ and ██████████, with refund claims for each of those years resulting. The Service Center allowed refunds for ██████████ and ██████████ in the amount of \$██████████ and \$██████████ respectively, plus interest. The ██████████ refund requested of \$██████████ was not sent out, because under I.R.C. § 6405(a) a Joint Committee report is required prior to issuing a refund in excess of \$1 million. The Examination Division has analyzed the ██████████ claim and determined that the claim will not be allowed.

Our advice was requested as to whether the ██████████ refund claim should have been aggregated with the ██████████ refund claim for the purposes of the report required by § 6405(a), and, if so, whether the failure to treat the ██████████ claim as a Joint Committee case prior to issuing the refund would provide the basis of an erroneous refund suit under I.R.C. § 7405(b).

DISCUSSION

Internal Revenue Code Section 6405(a) requires a report to the Joint Committee on Taxation prior to the allowance of any "refunds or credits" to a taxpayer in excess of \$1 million. The refund or credit cannot be made until after the expiration of 30 days from the date the report is submitted to the Joint Committee. There is no specific guidance in the statute, or in the regulations thereunder, on the issue of whether contemporaneous refunds for less than \$1 million for separate tax periods, totaling more than \$1 million together, should be aggregated for purposes of § 6405.

Taking a common sense approach, Internal Revenue Manual Section 4573 requires the aggregation of all refunds proposed for a taxpayer in order to determine whether a Joint Committee report is required. If the aggregate amount is over \$1 million, the audit procedures in IRM 4576 are followed, which results in either the preparation of a Joint Committee report, or the disallowance of the claim in whole or in part, as eventually happened in this case. For some reason the ██████████ claim in this case was not aggregated with the ██████████ claim--perhaps because the taxpayer submitted the claims to the Service Center in separate mailers.

Although a refund of over \$1 million should not be made without a report to the Joint Committee, the failure to make the required report does not provide a basis for an erroneous refund suit by the Government. Section 6405 does not provide that a refund made without the report is erroneous per se. The statute and related regulation contain no reference to any remedy if a refund has been made without the required report. And, not surprisingly, there are no reported cases in which the Government raised an argument that § 6405 provides an independent basis for an erroneous refund suit.

Furthermore, in this particular case a complicating factor is that no refund was actually allowed for [REDACTED], so there was no aggregate "over \$1 million" refund allowance ever proposed by the Government. Thus, the refund of the [REDACTED] claim did not violate § 6405.

Based upon the foregoing, we conclude that § 6405 does not provide a basis for an erroneous refund suit with respect to the [REDACTED] refund. With respect to any other issues which might have provided a basis for an erroneous refund suit, we note that Revenue Agent McMullen informed this office that Examination did not have the necessary files or evidence available which might support an erroneous refund suit recommendation based on the merits of the claim, and that her request for advice was limited to the § 6405 issue only.

If you have any questions, please contact me at 557-6014.

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Attorney